

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 25, 2006

BRIAN LARICE CURETON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2001-B-1008 Cheryl Blackburn, Judge

No. M2006-00141-CCA-R3-PC - Filed January 5, 2007

The Petitioner, Brian Larice Cureton, appeals as of right from the judgment of the Davidson County Criminal Court denying post-conviction relief. In 2002, a jury convicted the Petitioner of felony murder and aggravated child abuse, and he received sentences of life with the possibility of parole and twenty-five years respectively. This Court affirmed his convictions and sentence on direct appeal. Subsequently, the Petitioner filed a petition for post-conviction relief and, following an evidentiary hearing, the post-conviction court denied relief. He now appeals to this Court, arguing that he received the ineffective assistance of counsel due to trial counsels'¹ failure (1) to file a motion to suppress his statements made to the police and (2) to investigate and introduce prior acts of abuse by the State's key witness, Ms. Kianoltra Ewing, against the victim. After a review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. McLIN, JJ., joined.

Jeremy Parham, Nashville, Tennessee, for the appellant, Brian Larice Cureton.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

¹Two attorneys represented the Petitioner during his trial, and both testified at the post-conviction hearing. For purposes of this opinion, references to trial counsel include the actions of either or both attorneys.

OPINION

In February of 2002, the Petitioner was convicted by a Davidson County jury of aggravated child abuse and felony murder during the perpetration of aggravated child abuse. The Petitioner was sentenced to concurrent terms of life imprisonment with the possibility of parole for the felony murder conviction and twenty-five years as a violent offender for the aggravated child abuse conviction. On direct appeal, a panel of this Court affirmed the convictions and sentence. See State v. Brian Larice Cureton, No. M2002-00835-CCA-R3-CD, 2003 WL 22303084 (Tenn. Crim. App. Nashville, Oct. 8, 2003), perm. to appeal denied, (Tenn. Mar. 22, 2004). As summarized on direct appeal, the facts underlying these convictions are as follows:

At 7:45 a.m. on Friday, April 6, 2001, Angel Reynolds brought her four-year-old son, Jemond Reynolds Cureton, the victim in this case, to the emergency room at Tennessee Christian Medical Center. Dr. Jennifer Eisenhour testified that when the victim arrived he was lethargic and limp with a severely extended stomach. Although he was conscious, the victim was unable to respond to questions or follow commands. The emergency staff administered oxygen and then attempted to insert an IV. The victim's veins, however, had collapsed from shock. While the emergency staff was trying to locate a vein, the victim stopped breathing and then his heart ceased beating. The staff was not able to revive the victim, and he was pronounced dead at 9:36 a.m.

Ms. Reynolds testified that the victim had spent the nine days prior to his death with [the Petitioner] and his girlfriend, Ki[a]noltra Ewing. [The Petitioner] also had custody of his daughter, Mackenzie. Neither Ms. Reynolds nor Ms. Ewing was Mackenzie's mother. Ms. Reynolds said that [the Petitioner] was in and out of the victim's life until 2000 when Ms. Reynolds moved back to Nashville. At that time, [the Petitioner] expressed an interest in developing a relationship with his son, and the victim began spending alternating weekends with [the Petitioner] and Ms. Ewing. Later that year, Ms. Reynolds said that she decided to join the Tennessee National Guard which would require her participation in a nine- to sixteen-week basic training program. Ms. Reynolds and [the Petitioner] agreed that [the Petitioner] would have temporary custody of his son during that period. In order to accustom the victim to his new living arrangements, the child was spending more time with his father immediately prior to his death.

Ms. Reynolds described the victim as very energetic and talkative with a healthy appetite. Before he began staying with [the Petitioner] on a regular basis, he was completely toilet trained. While he was at [the Petitioner's] house, however, the victim had frequent accidents in his clothing. Ms. Reynolds said that she had discussed this problem with [the Petitioner], and, on one occasion, [the Petitioner] responded hysterically, saying that Ms. Reynolds had to come get the child because [the Petitioner] did not know how to deal with the victim's bathroom accidents.

Ms. Reynolds testified that on Thursday morning [the Petitioner] called her while she was at her parent's house and asked her to watch the victim and Mackenzie while [the Petitioner] went to a job interview. They arranged for [the Petitioner] to bring the children to Ms. Reynolds' parents' home. Ms. Reynolds said that when the children arrived around 9:00 or 9:30 a.m., the victim did not greet her as he usually did with a kiss and a hug but simply sat down in front of the television. Ms. Reynolds offered the children a snack, and the child ate a few crackers. Later, Ms. Reynolds and [the Petitioner] took the children to Ms. Reynolds' apartment where a friend was waiting to braid [the Petitioner's] hair. While they were there, Ms. Reynolds fixed lunch for the children. Although he drank all of his juice, the victim only managed to eat a portion of a hot dog and a few chips. Ms. Reynolds said she thought the victim was sick and checked his forehead for fever but the child's brow was cool. [The Petitioner] left with the children to pick Ms. Ewing up for lunch. The victim hugged and kissed Ms. Reynolds good-bye.

Ms. Reynolds testified that later that evening [the Petitioner] and Ms. Ewing called her on a three-way call about 9:30 or 10:00 p.m. and told her that the victim was crying and asking for [the Petitioner] who was over at a friend's house. A few minutes later, Ms. Ewing called her back, and Ms. Reynolds talked to the victim, telling him to calm down and go to bed.

Ms. Reynolds testified that on Friday morning Ms. Ewing called her around 5:30 a.m. and told her that [the Petitioner] had not come home Thursday night. Ms. Ewing asked Ms. Reynolds to watch the victim and Mackenzie so that she could go to work. Ms. Reynolds arrived at [the Petitioner's] home around 7:30 or 8:00 a.m. and immediately noticed that her son could barely walk. When Ms. Reynolds picked him up, she noticed that the victim's stomach was swollen and hard. Ms. Reynolds immediately took her son to the emergency room, arriving around 7:45 a.m.. [The Petitioner] and Ms. Ewing arrived at the hospital about thirty to forty-five minutes later. When the doctor told Ms. Reynolds and [the Petitioner] that the victim had died, [the Petitioner] screamed and began hitting the door.

Ms. Reynolds said that the police first approached her while she was at the funeral home and asked her and [the Petitioner] to accompany the officers to the station for questioning. Ms. Reynolds testified that on the way [the Petitioner] was very upset and said over and over in a loud voice that he did not do anything and that he was not going to jail.

On cross-examination, Ms. Reynolds said that Ms. Ewing had not mentioned that the victim was vomiting Thursday night in either of her telephone calls. When Ms. Reynolds told Ms. Ewing that she was going to take the victim to the hospital on Friday morning, Ms. Ewing appeared surprised. Ms. Reynolds said that the victim's

stomach was not swollen Thursday morning. She did not remember telling Detective Smith that the victim's appetite was good that morning.

Ms. Reynolds testified that she did not worry about leaving the victim with [the Petitioner] and Ms. Ewing. Ms. Reynolds also testified that both [the Petitioner] and Ms. Ewing appeared concerned while they waited at the hospital for word on the victim's condition.

Ms. Ewing next testified that she met [the Petitioner] in 1999 when she was eighteen and he was twenty-one. [The Petitioner] was Ms. Ewing's first serious boyfriend, and the couple lived together for a few months until [the Petitioner] moved to Milwaukee. When he returned, [the Petitioner] and Ms. Ewing resumed their relationship and were living together when the victim died. Ms. Ewing said that [the Petitioner] had four children, but only Mackenzie lived with her father. Ms. Ewing testified that the victim spent the night at [the Petitioner's] home periodically and had been staying with [the Petitioner] and Ms. Ewing a couple of days before he died. Because he did not have a job at the time, [the Petitioner] watched the children during the day while Ms. Ewing was at work.

Ms. Ewing said that she arrived home from work around 5:30 p.m. on Wednesday. After dinner, the victim soiled his clothes. Ms. Ewing said that she told the victim to take off his pants and underwear and then hit him three times on his buttocks with a belt. [The Petitioner] then struck the victim twice with the belt in the same spot. After the victim took a bath, [the Petitioner] continued the child's punishment. Ms. Ewing testified that [the Petitioner] taped two medium sized cans of food to the victim's hands and made him stand in a corner of the den, facing the wall, with his arms outstretched. [The Petitioner] then went into his bedroom to watch television.

Ms. Ewing said that the victim stood in the corner between thirty minutes and an hour while she sat on the couch watching television. Ms. Ewing said she noticed that the victim's arms were trembling after awhile, and he was bending backwards as if he were going to tumble over. Ms. Ewing said she told [the Petitioner] that the victim's arms were shaking, and he replied "good". The victim then started waving his arms around, trying to loosen the tape that held the cans to his hands. One of the cans eventually fell off. Ms. Ewing said that the victim picked the can up and threw it toward the couch where Ms. Ewing was sitting with Mackenzie in her lap.

Ms. Ewing told [the Petitioner] that the victim had thrown one of the food cans at Mackenzie, and [the Petitioner] came into the den. Ms. Ewing said that she could tell [the Petitioner] was angry from his expression. [The Petitioner] walked over to his son and untaped the remaining can from the child's hand. When [the Petitioner] set the can down on the floor, the victim appeared confused. [The

Petitioner] then grabbed the victim by his shirt and dragged him over to the couch. Ms. Ewing said that [the Petitioner] kept asking the victim why he threw the can, and the child replied that he did not know. [The Petitioner] sat down on the couch and pulled the victim toward him until the child was only a couple of inches away from [the Petitioner]. [The Petitioner] asked his son again why he threw the can. When the victim still did not answer, [the Petitioner] closed his hand in a fist and pulled his arm back until his fist was even with his shoulder. Ms. Ewing turned back to the television and when she looked back at [the Petitioner], his fist was against the victim's abdomen, just below the sternum. The victim stumbled back three or four paces. [The Petitioner] told the victim that he loved him and then told the child to go to bed. Ms. Ewing said that she was watching television during the incident and admitted that she did not intercede on the victim's behalf.

Ms. Ewing said that she did not observe any unusual behavior in the victim on Thursday morning. Ms. Ewing also did not notice any change in the victim's appetite because the children usually did not eat breakfast. [The Petitioner] drove Ms. Ewing to work on Thursday morning because his car was out of gas. Ms. Ewing said that [the Petitioner] and the children arrived to take her to lunch around 2:00 p.m., and the victim was asleep in the backseat. [The Petitioner] and Ms. Ewing ate a fast food meal in the car, but the victim did not eat. [The Petitioner] told Ms. Ewing that the victim and Mackenzie had already had lunch. While they ate, one of Ms. Ewing's friends stopped by the car and said "hi" to the victim who did not respond. Since it was unusual for the victim not to respond to greetings, Ms. Ewing looked at the victim and noticed for the first time that he had dried blood on his lip. She went into her office building to get a damp paper towel and cleaned the child's face.

Ms. Ewing testified that she got home from work around 5:30 p.m. on Thursday. She and [the Petitioner] stood in the front yard talking while the children played in their room. [The Petitioner] left to visit friends, telling Ms. Ewing that he would be home around 10:30 p.m.. When the victim discovered that his father was gone, he began crying. Ms. Ewing said that she called [the Petitioner] and told him to come home, but [the Petitioner] refused. The victim then soiled himself, and Ms. Ewing called [the Petitioner] again to tell him about the accident and [the Petitioner] spoke with the victim. After [the Petitioner] hung up, Ms. Ewing shoved the victim in the chest with her hand, and the child fell back against the wooden arm of the couch. Ms. Ewing then retrieved a belt and struck the victim three times in the buttocks. Following this incident, the victim vomited twice, and Ms. Ewing again called [the Petitioner] to ask him to return home. [The Petitioner] refused and told Ms. Ewing to feed the victim. She fixed a hot dog but the victim vomited again as soon as he took a bite, so she sent the child to bed.

Around 2:00 a.m. Friday morning, the victim fell out of bed. Ms. Ewing went into his bedroom and told him to get back in bed. Ms. Ewing next woke at 5:00 or 5:30 a.m. Ms. Ewing called Ms. Reynolds to come get the children because [the Petitioner] had not come home that night. The victim came into the den and asked for water. The child climbed up on the couch and lay down next to Ms. Ewing. Ms. Ewing rubbed the victim's stomach because he said it hurt. When she stopped, the victim complained again about the pain, and Ms. Ewing continued rubbing. Ms. Ewing admitted, however, that she was not really paying attention to the victim and did not notice that his stomach was swollen. Eventually, she gave the victim some medicine for gas and both Tylenol and Motrin for his pain.

Around 6:00 a.m., Ms. Ewing dressed the children and put them in the car. She then drove around for awhile trying to spot [the Petitioner's] car while the victim lay in the back seat. When she could not find [the Petitioner], Ms. Ewing returned home to wait for Ms. Reynolds.

Ms. Ewing admitted that she left out "bits and pieces" in her initial statement to the police. Ms. Ewing said that she wanted to tell the officers just enough so that they would let her go home. She also admitted that she did not mention that [the Petitioner] had struck the victim in the abdomen with his fist on Wednesday night. When Detective Smith asked her to take a polygraph test, Ms. Ewing said that she decided to describe all of the events immediately preceding the victim's death including his punishment on Wednesday night.

On cross-examination, Ms. Ewing admitted that she did not have much interaction with the victim when he visited [the Petitioner] and was not sure what was or was not normal behavior in the child. Ms. Ewing said that the victim did not like to spend time with her.

[The Petitioner's] counsel extensively cross-examined Ms. Ewing about the inconsistencies between her testimony at trial and her statements to the police concerning the sequence of events in the two or three days preceding the victim's death. Ms. Ewing's consistent response was that she did not remember making the statements reflected in the transcript of her interview with Mike Smith, a detective with the Nashville Metropolitan Police Department.

Ms. Ewing also testified on cross-examination that the victim was very thirsty Thursday night but she did not give him anything to drink so that he would not urinate in his pajamas. When the victim got up Friday morning, he still complained of thirstiness, and Ms. Ewing gave him water, juice, milk and Kool-aid. Ms. Ewing noticed the victim's stomach was tight when she rubbed it, but she did not really pay attention. Around 6:30 a.m., Ms. Ewing dressed the victim because he said his stomach was hurting. She then placed the children in her car and drove around

looking for [the Petitioner] for approximately ten minutes. When they returned home, the victim wanted more water, and this time he vomited after drinking. Ms. Ewing pushed him into the bathroom in case he vomited again.

The first time Ms. Ewing realized something was seriously wrong with the victim was when Ms. Reynolds arrived and the victim had difficulty walking. Ms. Ewing admitted that she told Ms. Reynolds that the victim was “fine just a minute ago”. Ms. Ewing said that she told Ms. Reynolds on Thursday night that the victim had vomited but that she had given him some medicine.

All sudden deaths of children are investigated by the police, and Detective Smith was assigned the victim’s case. After the autopsy was completed, the victim’s death was classified a homicide, and Detective Smith interviewed [the Petitioner] and Ms. Ewing. In his first statement, [the Petitioner] denied that his son was sick on Thursday. [The Petitioner] admitted that he often roughhoused with the victim, but denied ever hurting the child. [The Petitioner] said that he might have accidentally hit the victim in the chest on occasion because the boy squirmed when the two of them tussled. [The Petitioner] also told Detective Smith that the victim fell off of his bicycle on both Monday and Tuesday and landed face down in the grass.

After Detective Smith interviewed Ms. Ewing, he again questioned [the Petitioner]. At this point, [the Petitioner] admitted that on Wednesday night he struck the victim in the chest with his fist and spanked him for throwing the food can. Detective Smith said he arrested [the Petitioner] and read him his Miranda warnings. [The Petitioner] told Detective Smith that he “lost his cool” when the victim threw the food can but only “jabbed” him in the chest.

Dr. Jennifer Eisenhour was on duty the morning the victim was brought into the hospital. She administered oxygen to the child and then attempted to insert an IV. Before the IV was in place, however, the victim stopped breathing. Dr. Eisenhour said she place a breathing tube into the child’s trachea, and he started breathing again. However, during the process, the victim’s heart stopped and they were unable to revive him.

Dr. Eisenhour testified that she first believed that the victim was suffering from a perforated appendix or twisted bowel although the extent of swelling in his abdomen was not consistent with that diagnosis. After an x-ray indicated the presence of blood in the abdomen, however, Dr. Eisenhour concluded that the victim’s condition was the result of trauma rather than a medical or infectious condition.

Dr. Eisenhower said that when she told the family that the victim had died, [the Petitioner] became very upset and struck the door with his fist. Dr. Eisenhower called security because she was worried about [the Petitioner's] reaction.

Dr. Eisenhower testified that the autopsy revealed lacerations of both the pancreas and the small intestine. These results were consistent with the victim's physical symptoms and indicated a blunt force trauma to the abdomen. The lacerations permitted the contents of both organs to seep into the abdominal cavity causing swelling, inflammation, blood loss and eventually infection. Depending on the size of the lacerations, Dr. Eisenhower testified that a person would exhibit symptoms of abdominal swelling, thirstiness and vomiting within twenty-four to forty-eight hours of sustaining the injury. Dr. Eisenhower said, however, that the symptoms might be present in as little as twelve hours and noted that the more significant the bleeding, the more rapidly the symptoms would develop. Dr. Eisenhower did not discuss the timing of the victim's injuries with Dr. John Gerber, the forensic pathologist who performed the autopsy. Dr. Eisenhower said that she based her conclusion as to the timing of the injuries on her clinical findings. Regarding an opinion on the time of injury based upon tissue samples from the autopsy, she would defer to Dr. Gerber. Dr. Eisenhower testified that surgery would have been appropriate if the victim had been brought to the hospital sooner than Friday morning.

On cross-examination, Dr. Eisenhower testified that the abdominal wall of a child is not as developed as an adult's. Therefore, less force is necessary in order for blunt trauma to a child's abdomen to cause the same internal injuries as would be caused to an adult. Abdominal injuries in a child can result from a punch or pushing against a seat belt or striking the handlebar of a bicycle. However, Dr. Eisenhower confirmed that a punch would have to have "some significant driving force behind it" to cause the type of injuries suffered by the victim.

Dr. Gerber performed the autopsy. The autopsy results indicated that the victim's injuries were caused by a blunt force injury to the abdominal region which resulted in a two-inch laceration on the small intestine, a one-inch laceration in the pancreas, and mesenteric hemorrhage. The victim's death was caused by the accumulation of a large amount of fluid in the abdomen which pushed his diaphragm up against his lungs causing the victim's body to go into shock. The state of shock eventually caused the child's heart and lungs to stop functioning. Dr. Gerber testified that a blow to the area identified by Ms. Ewing as the place [the Petitioner] struck the victim would cause the injuries that led to the victim's death.

Dr. Gerber testified that the victim's symptoms and injuries were consistent with a blow to the abdomen inflicted between twelve to thirty-six hours prior to death. A twelve-hour time frame would indicate a catastrophic injury while a thirty-six hour time frame would indicate a small laceration in the pancreas and small

intestine. Dr. Gerber classified the lacerations on the victim's organs as "medium". Dr. Gerber based the outer limits of this time frame on the number of white blood cells present in the victim's system as well as the extent of the edema.

Dr. Gerber testified that the victim's lack of appetite and energy on Thursday morning, and the increasing severity of his symptoms during Thursday night, including thirstiness, pain, and bouts of vomiting, indicated that the injury was inflicted on Wednesday night rather than Thursday night. If, however, the victim's behavior was normal on Thursday morning as Ms. Reynolds initially told the police, then this factor would not indicate a Wednesday evening injury. Dr. Gerber said that there was an abrasion on the victim's mid-back area with some hemorrhage present beneath the bruising. The abrasion was inflicted within the same time frame that the internal injuries were sustained and could have caused the lacerations to the victim's pancreas and small intestine. Dr. Gerber testified that there was no external sign of injury to the abdomen, and the swelling of the victim's stomach, in and of itself, did not indicate where the blow was sustained. Dr. Gerber said that the swelling of the victim's stomach would be obvious. Both lacerations were possibly treatable if discovered in time.

Id. at *1-7.

On March 3, 2005, the Petitioner, pro se, filed a petition for post-conviction relief. Following the appointment of counsel, an amended petition was filed on May 9, 2005, wherein the Petitioner (1) contended the admission of his statements made to police violated his constitutional right against self-incrimination and (2) raised multiple claims of ineffective assistance of counsel. The Petitioner alleged that trial counsel were ineffective because they (1) failed to request a medical expert, (2) failed to properly investigate by not introducing prior acts of abuse by prosecution witness Kianoltra Ewing against the victim and by not interviewing other potential witnesses, and (3) failed to adequately advise the Petitioner as to whether he should testify at trial. Lastly, he contended that the cumulative effect of these errors on the part of trial counsel required a new trial.

On October 12, 2005, a hearing was held on the petition. At the outset of the hearing, the post-conviction court advised that the Petitioner's suppression argument was waived for failure to raise the issue in the trial court or on direct appeal. Counsel for the Petitioner then rephrased the argument, contending that trial counsel provided ineffective assistance by failing to file a motion to suppress the statement. Thereafter, the Petitioner and both trial counsels testified about the allegations contained in the petition. The Petitioner's mother, Jacqueline Cureton, also testified concerning alleged prior acts of abuse by Kianoltra Ewing against the victim.

After hearing all of the evidence presented, the post-conviction court denied relief by written order on December 20, 2005. This timely appeal followed.

ANALYSIS

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Petitioner argues that he received the ineffective assistance of counsel. The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by counsel and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The petitioner bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The petitioner's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made. See Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo

standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

I. Motion to Suppress

First, the Petitioner contends that trial counsel were ineffective for failing to file a motion to suppress his statements to police. Specifically, he argues that the statements were taken in violation of his Miranda rights. The Petitioner states that his “pre-Miranda statements were made pursuant to a custodial interrogation and, thus, should have been suppressed” and that his post-Miranda statements “should [have been] excluded as fruit of the poisonous tree.”

The Petitioner’s statements were videotaped, and the post-conviction court provided the following time-line surrounding the two tapes, which were entered into evidence at the hearing:

Tape 1 (April 10, 2001)

11:28:27	Interview begins; Detective Smith questions Petitioner
12:25:34	Detective Smith leaves the room
12:48:54	Detective Smith returns with Detective Postiglione; Detective Postiglione questions Petitioner
01:09:20	Both Detective Smith and Detective Postiglione leave the room
01:17:19	Door opens and Petitioner leaves the room.

In between the interview on Tapes 1 and 2, the police speak with Kia Ewing

Tape 2 (April 10, 2001)

05:04:34	Tape begins: Detective Smith questions Petitioner
05:10:46	Detective Smith leaves room
05:12:00	Detective Smith returns
05:12:40	Detective Smith says he will read Petitioner his rights
05:13:08	Reading of <u>Miranda</u> rights
05:14:46	Petitioner signs rights waiver; then questioning continues
05:29:48	Detective Smith leaves the room
05:32:18	Detective Smith returns and continues questioning
05:34:24	Detective Smith leaves room
05:35:39	Tape stops

The post-conviction court also made the following findings concerning the contents of the tapes:

The evidence indicates that Detective Mike Smith approached the Petitioner at the funeral home and informed him the police would like to question him. Petitioner agreed to come to the police station and met the police there; Angel Reynolds drove the Petitioner to the police station for the interview.

. . . .

Petitioner voluntarily submitted to the initial police questioning (not under Miranda), which lasted less [than] 90 minutes on the first tape and 10 minutes on the second tape. Prior to the questioning, Detective Smith informed Petitioner he was no[t] under arrest. Contrary to Petitioner's assertions in his petition and hearing testimony, the atmosphere of the questioning was non-threatening. Only one officer was present for the majority of the questioning and the tone was collegial. At no time during this initial questioning did Petitioner ask to leave. Once Petitioner made substantial admissions (during Tape 2), the police Mirandized him and the questioning continued for approximately 15 more minutes. During this interrogation, Petitioner did not invoke his rights.

At trial, Detective Mike Smith of the Nashville Metropolitan Police Department testified that the Petitioner was not under arrest when questioning began. According to Det. Smith, during the second interview, the "tenor or tone of [the] investigation change[d]" because the Petitioner's statements to Det. Smith indicated that he caused the injury to the victim that ultimately caused his death. Detective Smith testified that, in between the interviews with the Petitioner, detectives spoke with Kia Ewing. Detective Smith stated that, during her interview, Ms. Ewing requested to speak with the Petitioner, which request was granted. According to Det. Smith, in the meeting between the Petitioner and Ms. Ewing, Ms. Ewing asked the Petitioner "whether [Det. Smith] was trying to put it on her[.]" The Petitioner responded, "[K]inda [sic]." After this "brief" conversation, the two were again separated.

At the post-conviction hearing, trial counsel testified that, prior to trial, she was aware the State planned to introduce the videotaped interviews with the Petitioner and that she had watched the tapes. According to trial counsel, the Petitioner was shown the tapes, and she and the Petitioner discussed the statements prior to trial, including how he traveled to the police station and "the periods of time of him waiting" Trial counsel testified that she did not remember the Petitioner telling her that he asked to leave during the interrogation. She recalled that

he went to the police station on his own, and I don't really think I thought there was an issue there about suppression because of that fact. He went on his own. He—the—the video indicates that the officer told him initially that he's not under arrest, so I don't think we even considered filing a motion to suppress because we didn't think there was the issue of him being in custody.

She also stated that she was aware the Petitioner was at the police station for approximately five or five and half hours—questioned for about “two hours worth” of that time—before he was given Miranda warnings. Trial counsel testified that she did not file a suppression motion because she did not detect any valid grounds to support the motion.

The Petitioner’s other trial attorney also testified that he viewed the tapes with the Petitioner “several times” and that they discussed the statements prior to trial. He likewise testified that he did not recall the Petitioner telling him about asking to take a break from questioning or to leave the police station and that he was denied that request. Trial counsel stated that he was aware the Petitioner had been at the police station “for some time before he was advised of his rights[.]”

The post-conviction court concluded that the Petitioner had “not demonstrated by clear and convincing evidence that trial counsel was ineffective for not filing a suppression motion or objecting to the admission of the tape, nor ha[d] he demonstrated prejudice” and reasoned as follows:

Had a suppression motion been filed, however, this Court would have denied the motion. Petitioner’s pre-Miranda statements are admissible because he voluntarily submitted to police questioning. The Court has reviewed the tapes submitted by Petitioner and finds that the post-Miranda statements are likewise admissible. Petitioner was read his rights and elected to waive those rights and continue speaking with the police. The Court finds there were no violations of Petitioner’s rights during the police interviews.

The Petitioner requests that this Court conclude that his pre-Miranda statements were made pursuant to a custodial interrogation and therefore suppress both pre- and post-Miranda statements. First, both trial counsel testified that they did not recall the Petitioner informing them that he asked to take a break from questioning or to leave the police station and that he was denied that request. The post-conviction court found, “[Trial counsel] testified that she did not see any valid grounds to suppress the statement. Thus, she did not file a suppression motion.” The record supports the conclusion that the Petitioner did not inform trial counsel of this information and, therefore, deficient performance has not been shown.

Second, in order to determine that the statements were made pursuant to a custodial interrogation, we would have to decide that the post-conviction court incorrectly found that “there were no violations of Petitioner’s rights during the police interviews.” The Petitioner argues that such a determination is necessary based upon his testimony that he asked for a break during questioning and requested to leave the police station but that these requests were denied. The post-conviction court obviously did not accredit the testimony of the Petitioner on this issue, and both the videotaped interviews and the trial testimony of Det. Smith support the post-conviction court’s ruling that no custodial interrogation occurred. Moreover, if a motion to suppress had been filed, the detectives conducting the interviews would have testified at the hearing about the circumstances

surrounding the statements. The detectives did not testify at the post-conviction hearing, and we may not speculate on what the testimony of these detectives might have been or what benefit or detriment this testimony might have offered to the Petitioner's case. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We conclude that the Petitioner is not entitled to relief on this issue.

II. Prior Bad Acts of Kianoltra "Kia" Ewing

Next, the Petitioner contends trial counsel were ineffective "due to their failure to investigate [the Petitioner's] case and introduce evidence of prior bad acts concerning a prosecution witness[.]" specifically Ms. Kia Ewing. The Petitioner argues that the following prior acts of Ms. Ewing should have been introduced into evidence:

(1) [the victim] was burned while left in Ms. Ewing's care in [sic] or about December 2000; (2) [the victim] received injuries which resulted in swelling or "knots" on his head while in Ms. Ewing's care; (3) Ms. Ewing previously and on multiple occasions struck [the victim] with a closed fist; and most importantly, (4) Ms. Ewing struck [the victim] in the stomach on the Wednesday evening before he passed away.

The Petitioner, relying on State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002), argues that this evidence against Ms. Ewing was admissible. In Stevens, the Tennessee Supreme Court held that Rule 404(b) does not apply when a third party defense is at issue. Stevens, 78 S.W.3d at 837; see also State v. Rogers, 188 S.W.3d 593, 612-13 (Tenn. 2006). Both trial counsel testified that the theory of the defense was that Ms. Ewing inflicted the fatal wound.

According to trial counsel, they had discussions with the Petitioner about Ms. Ewing's alleged prior acts of abuse. Trial counsel had filed a motion in limine requesting permission to impeach Ms. Ewing with one prior bad act of abuse. The State had filed a notice of intent to use evidence of prior bad acts of the Petitioner against the victim. Trial counsel testified that, before trial, she entered into an agreement with the State that neither party would introduce evidence of prior acts of abuse by the Petitioner or Ms. Ewing.

He further appears to contend that trial counsel should have presented his mother, Jacqueline Cureton, to testify in his defense at trial regarding the acts of abuse by Ms. Ewing. Although not specifically stated in the appellate brief, counsel for the Petitioner implied at the post-conviction hearing that Rule 404(b), while not applicable to the prior bad acts of Ms. Ewing, would exclude from evidence the prior bad acts of Petitioner. However, the Petitioner's argument is flawed. Any questioning of a witness or inference about prior acts of abuse by Ms. Ewing would have "opened the door," and Ms. Ewing would have been given the opportunity to explain why she did or did not do certain things. See State v. Antonio George, No. E2005-02013-CCA-R3-CD, 2006 WL 3371238, at *7 (Tenn. Crim. App., Knoxville, Nov. 20, 2006) (citations omitted). According to trial counsel, Ms. Ewing's explanation would have inculpated the Petitioner in these prior acts of abuse. Thus, trial counsel's decision to enter into an voluntary agreement with the State not to inquire into the

prior incidents of abuse was a tactical decision and sound trial strategy. The record supports the post-conviction court's ruling:

The strategy was to keep the prior instances of abuse out of the trial so as to not open the door to the prior assaults committed by Petitioner, which may have been harmful to Petitioner's case. Thus, it was a defense trial strategy decision not to question about the prior abuse so as to not let the jury hear about the prior abuse inflicted by Petitioner.

The Petitioner has failed to establish ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, we conclude that the Petitioner's allegations of ineffective assistance of counsel are without merit. Accordingly, the judgment of the Davidson County Criminal Court is affirmed.

DAVID H. WELLES